

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CORNELIUS GREEN,

Plaintiff,

v.

DECISION AND ORDER
09-CV-01106

DR. CRISTINA MISA,

Defendant.

This case involves allegations by an incarcerated *pro se* plaintiff that defendant violated his Eighth Amendment rights by demonstrating deliberate indifference to his medical needs, specifically by failing to timely treat his knee injury. The matter was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. §636(b)(1), for supervision of all pre-trial proceedings. Defendant filed a motion for summary judgment on April 25, 2012. (Dkt. No. 28)

On February 28, 2013, Magistrate Judge Foschio issued a Report and Recommendation recommending that defendant's motion for summary judgment be granted and plaintiff's claim be dismissed in its entirety. (Dkt. No. 32)

Magistrate Judge Foschio found, after construing the evidence in the light most favorable to plaintiff, that there was no genuine issue of material fact as to whether defendant's delayed approval of plaintiff's knee surgery resulted in a degeneration of his knee condition as required under the objective prong of

plaintiff's Eighth Amendment claim. Magistrate Judge Foschio further found that there was no genuine issue of material fact as to whether defendant's denial of plaintiff's earlier requests for surgery constituted deliberate indifference sufficient to establish a claim under the Eighth Amendment.

On March 15, 2013, plaintiff filed objections to Magistrate Judge Foschio's Report and Recommendation. (Dkt. No. 33) This Court then issued an order directing defendant to file a response to plaintiff's objections on or before April 5, 2013 and directing plaintiff to file a reply, or a notice of no reply, on or before April 26, 2013. (Dkt. No. 34) Defendant filed a response to plaintiff's objections on April 5, 2013. (Dkt. 35) Plaintiff has yet to submit a reply to defendant's response. Since ample time has now passed for plaintiff to reply, but has failed to do so, the Court deems the matter submitted.

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review, and after reviewing the parties' submissions, the Court hereby adopts Magistrate Judge Foschio's recommendation to grant defendant's motion for summary judgment and dismiss plaintiff's claim in its entirety.

Accordingly, for the reasons set forth in Magistrate Judge Foschio's Report and Recommendation, defendant's motion for summary judgment is granted. The Clerk of the Court is directed to close the case.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: June 6, 2013